TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted]119

ALVAH CROCKER *ET AL.*, TRUSTEES, PETITIONERS,

vs.

JOHN F. MALLEY, COLLECTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1923.

CERTIORARI AND RETURN FILED DECEMBER 11, 1923.

(29,137)

(29,137)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 587.

ALVAH CROCKER *ET AL.*, TRUSTEES, PETITIONERS,

vs.

JOHN F. MALLEY, COLLECTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

	Original.	Print.
Proceedings in U. S. circuit court of appeals	1	1
Writ of error	1	1
Return to writ of error	2	2
Record from U. S. district court for the district of Massachusetts	3	2
Writ and officer's return thereof	3	2
Declaration	4	3
Exhibit A—Original declaration of trust	7	5
Exhibit B—Modification of declaration of trust	12	8
Waiver of jury trial	17	11
Amended answer	17	11
Hearing	18	12
Agreement for judgment	18	12
Judgment	18	12
Bill of exceptions	19	12
Findings of facts	20	13
Defendant's requests for rulings	22	14
Memorandum of decision	23	15
Opinion of district court in Hecht *vs.* Malley	24	15
Plaintiffs' Exhibit 5—Certificate of beneficial interest	30	19
Plaintiffs' Exhibit 6—Balance sheet, July 1, 1917	32	20
Petition for writ of error	32	21
Assignment of errors	33	21

	Original.	Print.
Citation and acknowledgment of service thereof	35	22
Certificate of clerk of district court	36	23
Opinion, Anderson, J	37	23
Petition for rehearing	53	34
Hearing	61	38
Judgment	61	38
Order denying petition for rehearing	61	39
Motion for stay of mandate	62	39
Order staying mandate	62	39
Clerk's certificate	62	40
Writ of certiorari and return	64	40

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1921.

No. 1553.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant, Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiff, Defendant in Error.

WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Judge of the District Court of the United States for the District of Massachusetts: Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between Alvah Crocker, Charles T. Crocker, Douglas Crocker, Samuel E. M. Crocker and Bigelow Crocker all of Fitchburg, District of Massachusetts, John J. Riker, of the city of New York, in the State of Massachusetts, and Isaac T. Burr, of Milton, in the District of Massachusetts, Trustees of Crocker, Burbank & Co., Ass'en, under Declaration of Trust, dated March 29th, 1912, as modified by an instrument dated June 26, 1917, plaintiffs, and John F. Malley, of Boston, formerly Collector of Internal Revenue for the Third District of Massachusetts, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein
2 given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the twentieth day of April next, in the said Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-two. James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

Allowed by J. M. Morton, Jr., U. S. District Judge.

RETURN OF DISTRICT COURT ON WRIT OF ERROR.

District Court of the United States, District of Massachusetts, ss.

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In Testimony Whereof, I, James S. Allen, Clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said Court this seventeenth day of April, A. D. 1922. [Seal.] James S. Allen, Clerk.

3 [Title omitted.]

The writ and declaration in this cause were filed in the clerk's office of this court on the twenty-fourth day of November, A. D. 1919, and are in the words and figures following:

WRIT.

[L. S.] MASSACHUSETTS DISTRICT, *ss:*

The President of the United States of America to the Marshal of our District of Massachusetts or his Deputy, Greeting:

We command you to attach the goods or estate of John F. Malley, of Boston, who was formerly Collector of Internal Revenue for the Third District of Massachusetts, in our District of Massachusetts, to the value of eight thousand dollars, and summon said defendant (if he may be found in your District) to appear before our Judge of our District Court, next to be holden at Boston, within and for our said District of Massachusetts, on the third Tuesday of March next. Then and there, in our said court, to answer unto Alvah Crocker, Charles T. Crocker, Douglas Crocker, Samuel E. M. Crocker and Bigelow Crocker, all of Fitchburg in said District of Massachusetts, John J. Riker, of the City of New York in the State of New York, and Isaac T. Burr, of Milton in said District of Massachusetts, Trustees of Crocker, Burbank & Co., Ass'cn., under declaration of trust dated March 29, 1912, as modified by an instrument dated June 26, 1917. In an action of contract.

To the damage of the said Alvah Crocker et als., Trustees

4 (as they say), the sum of eight thousand dollars, which shall then and there be made to appear, with other due damages.

And have you there this writ, with your doings therein.

Witness, the Honorable James M. Morton, Jr., at Boston, the nineteenth day of November in the year of our Lord one thousand nine hundred and nineteen. James S. Allen, Clerk.

OFFICER'S RETURN ON WRIT.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Boston, November 22, 1919.

Pursuant hereunto I have this day at — o'clock and — minutes, — m., attached a chip as the property of the within named John F. Malley; and afterward on the same day I summoned the within named John F. Malley to appear at Court and answer as within commanded by giving to him in hand at Boston in said district an original summons to this writ. John J. Mitchell, United States Marshal, by John H. Backus, Deputy.

Fees:	Service	$2.00
	Travel	.06
		$2.06

PLAINTIFFS' DECLARATION.

[Filed November 24, 1919.]

And the plaintiffs say:

1. The plaintiffs are the trustees of "Crocker, Burbank & Co., Ass'cn," so called, under a declaration of trust made under date of March 29, 1912, as modified by a new and supplementary instrument made under date of June 26, 1917, copies of which instruments are hereto attached and hereby referred to and made a part hereof, marked "Exhibit A" and "Exhibit B." The defendant was, in July, 1918, and subsequently until some time after January, 1919, the collector of Internal Revenue for the Third District of Massachusetts, and the plaintiffs' cause of action arose from the
5 wrongful acts and doings hereinafter alleged of the defendant while acting, or undertaking and intending to act, in said official capacity.

2. Said trustees in the year ending June 30, 1918, and subsequently, owned and operated mill properties in the City of Fitchburg, Massachusetts, and carried on the business of paper manufacturers for the benefit of the holders of receipt certificates issued by the trustees evidencing the ownership of the beneficial interests in the trust, as provided in said trust declaration and modification thereof, and subject to and in accordance with all the terms, trusts and provisions of said instruments.

3. Said original declaration of trust (Exhibit A) did not create or organize or establish an association, joint stock company or corporation. The persons entitled to beneficial interests in the property held by the trustees thereunder were beneficiaries of a strict trust, without any relation or association among themselves or with the trustees. The income received by the trustees under said original declaration of trust was not the income of an association or joint stock company within the meaning of the Federal Income Tax Law,

Act of September 8, 1916, chapter 463. By the said modification (Exhibit B) of said original trust declaration, it was stated and declared that the form of the organization was changed to that of an "association," and certain limited powers of meeting and acting as associates for certain specific purposes were conferred upon the cestuis que trust, or shareholders. But it was expressly provided that title to the trust property of every description and the right to conduct all the business thereof were vested exclusively in the trustees.

4. Crocker, Burbank & Co., Ass'cn., is the name by which the association formed by said modification (Exhibit B) of said original trust declaration is designated and consists solely of the persons holding receipt certificates of beneficial interest issued by the trustees evidencing their respective rights and interests in and to the trust estate and the income thereof, as provided, specified and
6 limited in said trust declaration and modification thereof. Neither said original declaration, nor the same as modified, provided for the creation of a capital stock. No funds or property were ever contributed or paid in as a capital stock either under the original trust or under the modification thereof and the existing association has not now and never at any time has had a capital stock, or a capital stock divided into shares or represented by shares.

5. The plaintiffs, as trustees, as aforesaid, in July, 1918, having been required and directed by the defendant, then Collector, as aforesaid, to make return, as if said Crocker, Burbank & Co., Ass'cn., were an association or joint stock company having a capital stock represented by shares subject to an excise tax under the provisions of Title IV, section 407, of the Act of Congress of September 8, 1916 (39 Statutes at Large, 789), filed a return, but under protest, and thereafter the Commissioner of Internal Revenue, purporting to act under said statute of the United States, wrongfully and unlawfully assessed upon said Crocker, Burbank & Co., Ass'cn., a capital stock tax in the sum of $5,212, for the privilege of doing business for one year from July 1, 1918.

6. And the said defendant, as Collector, thereafter, on or about December 30, 1918, wrongfully and unlawfully demanded payment of said tax of the plaintiffs, as trustees and officers of said Crocker, Burbank & Co., Ass'cn., and the plaintiffs, as such trustees and officers, and solely because thereto required and compelled by the defendant, as Collector as aforesaid, paid to him, under protest in writing, on the third day of January, 1919, said alleged tax amounting to the sum of $5,212, illegally assessed as aforesaid.

7. And the plaintiffs, thereafter, more than six months prior to the bringing of this suit, to wit: on the seventh day of January, 1919, made appeal to the Commissioner of Internal Revenue in due form for refund of said illegal tax, and said Commissioner has hitherto taken no action thereon, and has delayed his decision of said appeal for more than six months.

7 Wherefore, the defendant owes the plaintiffs the amount of said tax, to wit: the sum of $5,212, illegally assessed and collected as aforesaid, with interest thereon from date of payment hereinbefore alleged. By their Attorneys, Dunbar & Rackemann.

EXHIBIT A.

The Wachusett Realty Trust Declaration.

Know all men by these presents That we, Alvah Crocker and Charles T. Crocker, both of Fitchburg in the Commonwealth of Massachusetts, John J. Riker of the City and State of New York, Samuel E. M. Crocker of said Fitchburg, and Felix Rackemann of Milton in said Commonwealth, the grantees named in a certain deed from the Crocker, Burbank & Co., Inc., (Maine Corporation), dated this day by which deed there are conveyed to us certain lands and buildings situate in the City of Fitchburg in the Commonwealth of Massachusetts, hereby declare and agree that we will, and our heirs and successors shall, hold said granted premises, and all other funds and property at any time transferred to and received by the Trustees hereunder, for the purposes, with the powers, and subject to the provisions hereof, for the benefit of the cestuis que trust (who shall be trust beneficiaries only, without partnership, associate or any other relation whatever inter sese), and upon the trusts following, viz:

1. In trust to convert the same into money and distribute the net proceeds thereof among the persons at the time of such conversion holding and owning beneficial interests therein, as evidenced by the receipt certificates issued by the Trustees as hereinafter provided; it being however expressly understood and agreed that the Trustees may, in their uncontrolled discretion, defer or postpone such conversion and distribution, except that the same shall not be postponed beyond the end of twenty years from and after the
8 death of the last survivor of the persons named and described in the last paragraph hereof. During such postponement, and until such conversion, the interests of the cestuis que trust shall be considered for purposes of transmission and otherwise as personal property.

2. In trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having, for such purposes and for all purposes of sale, lease, mortgage, exchange, improvement and development, and any and all arrangements, contracts and dispositions of the trust property, or any part thereof, all and as full discretionary powers and authority as they would have if they were themselves the sole and absolute beneficial owners thereof in fee simple.

3. In trust to collect and receive all rents and income from the property, and semi-annually or oftener at their convenience, to distribute such portion thereof as they may, in their discretion, determine to be fairly distributable net income to and among the several cestuis que trust according to their respective fractional interests, the Trustees in this connection having full authority from time to time to use any funds on hand, whether received as capital or income, for purposes of any repair, improvement, protection or development of the property held hereunder, or the acquisition of

other property as the Trustees may determine to be wise and expedient, for the protection and development of the trust property as a whole pending its conversion and distribution. The determinations of the Trustees, made in good faith, as to all questions as between "capital" and "income" shall be final.

4. The said Crocker, Burbank & Co., Inc., (Maine Company) having determined to wind up its affairs and be dissolved, without waiting for final cash sale of its real estate, this trust is declared in favor, and for the benefit of the eight shareholders of said Maine corporation, according to their respective fractional interests, to whom the Trustees shall issue proper receipt certificates, which certificates, and all others which may be hereafter issued in exchange or
9 substitution therefore, shall be deemed parts hereof and conclusively evidence the ownership of respective interests in this trust; and the Trustees shall, from time to time, on request, (on surrender of the old) issue such new certificates as may be proper and necessary to evidence any new or sub-divided interests.

5. The Trustees shall have authority to borrow money and fix the terms of any loans, and give any pledge, mortgage or other security which they may deem wise.

No purchaser from or lender to the Trustees shall ever have any liability to see to the application of any proceeds.

6. The Trustees may employ all such agents and attorneys as they may think proper and find expedient, and prescribe their powers and duties, and shall not be personally responsible for any misconduct, errors or omissions of such agents or attorneys employed and retained with reasonable care.

7. The Trustees shall at all times keep full and proper books of account and records of their proceedings and doings, and shall, at least annually, render account of the trust to any beneficiary requesting the same, but no Trustees serving hereunder shall be obliged to give any bond, nor shall any Trustee have any liability except for the results of his own gross negligence or bad faith.

8. The recording of this instrument shall be at such times and in such places as the Trustees may in their discretion, determine to be necessary or expedient, and they shall in like manner determine the form and record of all muniments of title.

9. The Trustees shall have full power at any time, pending final termination of this trust, to transfer the whole or any part of the property then held by them hereunder to any corporation which they may acquire or cause to be organized for the more convenient or expedient holding or management of the property, taking any securities issued by such corporation in exchange and payment therefor, and the Trustees, or any of them, may at any time be or become directors or officers of any corporation any shares of which are held by them.

10 10. The Trustees shall be entitled to receive reasonable compensation for service not exceeding a total of one per cent reckoned upon the gross income received by them as such, unless, at any time, a majority in interest of the cestui que trusts consent in writing to some larger compensation for any past service.

The Trustees shall also be entitled to reimbursement and indemnification from the trust property for all their proper expenses and liabilities, and shall be entitled at all times to the advice of counsel; and traveling expenses to and from any meetings of the Trustees shall be considered proper expenses.

11. Any Trustee hereunder may resign by written instrument duly acknowledged and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

Any vacancy in the office of the Trustee, however occasioned, shall be filled by the remaining Trustees by an instrument in writing, signed by them and assented to in writing, by the holder or holders of a majority in amount of the beneficial interests herein, such appointment to be in like manner attached to the original of this instrument, or recorded as in the case of resignation last above provided for.

12. If, at any time or times, a majority of the Trustees hereunder shall certify in writing that the remaining Trustees are either absent from the Commonwealth of Massachusetts or incapacitated through illness or otherwise, from acting, then such majority shall, at such time or times, have, and may exercise, any and all the powers of the Trustees hereunder with like effect as if similarly exercised by all.

13. The terms and provisions of this trust may be modified at any time or times by instrument in writing, signed, sealed and acknowledged by the then Trustees, assented to in writing by a majority in interest of the cestuis que trust, and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

11 14. The certificate in writing of the Trustees as to any resignation from the office of Trustee hereunder and as to the appointment of any new trustees hereunder and as to the existence or non-existence of any modifications hereof, may always be relied upon, and shall always be conclusive evidence in favor of all persons dealing in good faith with said Trustees in reliance upon such certificate.

15. The title of this trust, (fixed for convenience) shall be "The Wachusett Realty Trust", and the term "Trustees" in this instrument shall be deemed to include the original and all successor trustees.

16. At the end of twenty years from and after the death of the last survivor of said Charles T. Crocker, Samuel E. M. Crocker and Alvah Crocker, and of the lawful issue now living of any of them (unless this trust shall heretofore have been otherwise lawfully terminated), all the property of every kind then held hereunder shall be sold by the Trustees and equitable distribution made of the net proceeds among the persons then entitled.

In witness whereof we have hereunto set our hands and common seal on this 29th day of March in the year nineteen hundred and twelve. [Seal.] Alvah Crocker. Charles T. Crocker. John J. Riker. Felix Rackemann. Samuel E. M. Crocker.

COMMONWEALTH OF MASSACHUSETTS,
Worcester, ss:

March 29, 1912.

Then personally appeared the above named Alvah Crocker and acknowledged the foregoing instrument to be his free act and deed,
Before me, —— ——, Justice of the Peace.

12 **EXHIBIT B.**

Crocker, Burbank & Co. Assen.

The Wachusett Realty Trust—Trust Modification.

Known all men by these presents

1. That our declaration of "The Wachusett Realty Trust so-called, made under date of March 29, 1912, and duly recorded with Worcester County (North District) Registry of Deeds, remains in full force and without modification of any kind down to the date of this instrument.

2. Under the terms of our said declaration the following modifications thereof are hereby made and established.

3. The form of our organization (heretofore a strict trust under the laws of Massachusetts) being hereby changed to that of an association, the name and title of the organization is hereby changed from "The Wachusett Realty Trust" to "Crocker, Burbank & Co., Ass'cn."

4. The trustees may, in their discretion, acquire, in whole or part, the property, assets and business, including good will, of the Massachusetts corporation known as Crocker, Burbank & Co., Inc., and may carry on the business heretofore conducted by that corporation, or any substantially similar business, according to their discretion, surrendering the shares of capital stock of said corporation now held by them in whole or part, and causing the said corporation to be dissolved or kept alive as they may determine.

5. For the more convenient transaction of the business of the Trust the trustees may choose and designate from their number a president, one or more vice-presidents, a treasurer, an assistant treasurer, secretary and assistant secretary, and prescribe their respective authorities and duties by such rules or votes as they may from time to time establish and adopt, and with the right to have more than one of such offices filled by the same individual. Such officers shall hold their respective offices at the pleasure of
13 the trustees and they, as well as the trustees, may receive such reasonable compensation for services as the trustees may from time to time determine.

6. The trustees may create such reserves as they may consider expedient and hold the same in any form, according to their discretion.

7. The fiscal year of the Trust shall end on the last day of D

cember in each year; and statements of account and condition shall be available at any meeting of shareholders.

8. The beneficiaries hereunder, or shareholders, may hold such meetings as they may desire, and meetings of the sharehold-rs shall be called by the secretary or assistant secretary at any time, on request of one-third or more in interest of the shares outstanding, notice being sent by mail to each shareholder at his registered address, at least seven days before the meeting. A majority in interest of the outstanding shares shall be necessary to constitute a quorum at all meetings.

At the shareholders' meetings the president or one of the vice-presidents shall, if present, preside, otherwise the meeting may choose its own chairman; and the secretary or assistant secretary shall be the regular recording officer of such meetings, if present, otherwise the meeting may choose its own recording officer. No business shall be transacted at any meeting of the shareholders unless notice of such business has been given in the call for or notice of the meeting; or unless all shares are represented and assenting.

At any meeting of the shareholders properly notified for the purpose, the shareholders by majority vote may remove from office any one or more of the trustees, and elect another or others to fill any such or other vacancies so or otherwise occasioned, and upon any such election or upon the appointment of any trustee under Article II of said original declaration of trust, the trust estate shall vest in the new trustee or trustees jointly with the continuing trustees without any further act or conveyance.

Shareholders, at all meetings, shall be entitled to one vote
14 for each fractional participation or share held by them respectively, and shareholders may vote by proxy as in common corporate form.

9. The terms "trust beneficiaries" and "cestuis que trust" as occurring in the original declaration of March 29, 1912, shall be hereafter deemed synonymous with the word "shareholders" as herein used.

10. The assent of the shareholders to any future modification of this trust may be evidenced either by a writing signed by a majority in interest of such shareholders, or cestuis que trust, or by a vote of such majority passed at a meeting of the shareholders called for the purpose, and the written statement of a majority of the trustees, or of their secretary, or of the de facto recording officer of the meeting of the shareholders, as the case may be, that the persons assenting to such modification, are, in fact, the majority in interest of the shareholders, or that any stated vote was so passed and adopted by such majority in accordance herewith, shall be conclusive evidence in favor of all persons dealing in good faith with the trustees in reliance thereupon.

11. The title to the trust property of every description, and the right to conduct all the business thereof, are vested exclusively in the trustees and the shareholders are without interest therein other than as herein expressly provided, and shall have no right to call for any

partition or division of property, profits, rights or interests. The death of any shareholder during the continuance of this trust shall not terminate the same, nor give his or her legal representatives any right to account or to any action in the courts or otherwise, against other shareholders or the trustees, but shall simply entitle the legal representatives of the deceased to demand and receive a new certificate in place of the certificate held by the deceased, or to such new certificates as will enable such personal representative to distribute the shares in accordance with any specific directions of the will of a deceased shareholder, or among the heirs or next of kin of such shareholder in case of intestacy.

12. The transferability of all shares issued hereunder shall always be subject to the following restrictions, viz: That no shareholder and no personal representative, assignee, or trustee in bankruptcy of any shareholder, shall have any right to transfer any of said shares to any person other than an existing shareholder hereunder, without first offering the same to the trustees and giving them reasonable opportunity to purchase the same for the Trust at the price at which they are proposed to be sold or sold. With the written assent of a majority of the Trustees shares may be so sold. The purpose of this provision is to keep in the board of trustees full power to determine the persons who may be admitted to the association hereby created, and the trustees are given full power to use any property of the Trust, to purchase any shares offered them in this connection.

Any shares so acquired by the trustees may be resold by them in their discretion.

13. The number of the Trustees is hereby increased from five to seven, and Douglas Crocker, (son of Alvah) and Bigelow Crocker, (son of Charles T.), all of Fitchburg, are hereby appointed and constituted trustees under said original Trust Instrument and this modification with like effect as if they had been original trustees.

14. The trustees signing this instrument hereby certify, in accordance with the provisions of Articles 12 and 14 of their original declaration of trust, dated March 29, 1912, that Felix Rackemann one of the original trustees, heretofore resigned and that I. Tucker Burr of Milton, Massachusetts, was duly constituted trustee to fill the vacancy so occasioned.

We further certify that the persons whose names appear as signers of the assent attached at the end hereof are the owners and holders of record of more than a majority in interest of the receipt certificates or shares outstanding under the original Declaration on the date hereof, that the trusts of said original Declaration of March 29, 1917, are hereby duly modified as hereinabove expressed, and that Douglas Crocker and Bigelow Crocker have hereby become trustees.

In witness whereof we, trustees under said original Declaration hereunto set our hands and common seal on this 26th day of June 1917.

COMMONWEALTH OF MASSACHUSETTS,
Worcester, ss:

June 26, 1917.

Then personally appeared the above named —— —— and acknowledged the foregoing instrument to be his free act and deed.

Before me, —— ——, Justice of the Peace.

We, the undersigned, holders of more than a majority in interest of the certificates of beneficial interest or fractional shares in the Trust mentioned in the foregoing instrument, and now outstanding, do hereby assent to the modifications of the Trust declared by Alvah Crocker et ali, dated March 29, 1912, and known as "The Wachusett Realty Trust" as expressed in the foregoing instrument.

Upon the filing of the writ and declaration herein, an order to plead was entered.

This cause was thence continued to the December Term, A. D. 1919, when, to wit, December 23, 1919, an answer was filed.

This cause was thence continued from term to term to the September Term, A. D. 1920, when, to wit, October 14, 1920, the following Waiver of Jury Trial was filed:

17 **WAIVER OF JURY TRIAL.**

[Filed October 14, 1920.]

The parties to the above-entitled cause hereby agree to waive trial by jury and to submit the issues to determination of the court. Dunbar & Rackemann, Attorneys for Plaintiffs. Daniel J. Gallagher, United States Attorney. Alonzo H. Garcelon, Special Assistant U. S. Attorney.

This cause was thence continued to the December Term, A. D. 1920, when, to wit, December 28, 1920, a motion to amend defendant's answer was filed by consent and allowed by the court.

Thereupon, on the same day, the following Amended Answer was filed:

DEFENDANT'S AMENDED ANSWER.

[Filed and Allowed December 28, 1920.]

Now comes the defendant in the above entitled action and for answer says that the capital stock tax for the period from July 1, 1918, to June 30, 1919, referred to in the plaintiffs' declaration was due and payable to the United States in accordance with Revenue Act of 1918, Act of February 24, 1919, Chap. 18, Sections 1000 and 1004; Comp. St., Sections 5980 (*n*) and 5980 (*r*).

And the defendant further says that it does not appear in the plaintiffs' declaration that the plaintiffs have complied with the requirements of Revised Statutes Sec. 3226, Comp. St. Sec. 5949.

And further answering the defendant denies each and every
18 material allegation, item, count and particular in the plaintiffs' writ and declaration contained. Daniel J. Gallagher,

United States Attorney. Alonzo H. Garcelon, Special Assistant U. S. Attorney.

On the said twenty-eighth day of December, this cause came on to be heard by the court, without a jury.

This cause was thence continued under advisement from term to term to the September Term, A. D. 1921, when, to wit, December 3, 1921, finding of facts and memorandum of decision was filed.

This cause was thence continued to the present December Term, 1921, when, to wit, February 1, 1922, a bill of exceptions is filed by defendant within extended time and is allowed by the court on March 13, 1922.

On the thirteenth day of March, A. D. 1922, the following Agreement for Judgment is filed:

AGREEMENT FOR JUDGMENT.

[Filed March 13, 1922.]

It is hereby mutually agreed that judgment may be entered forthwith upon the finding of the court for the plaintiff- in the sum of $5,212 damages, with interest from January 3, 1919, and their costs of suit taxed at $—. Dunbar & Rackemann, Attorneys for Plaintiffs. Robert O. Harris, United States Attorney. Frederic S. Harvey, Assistant U. S. Attorney.

Thereupon, to wit, March 13, 1922, it is considered by the court that the said Alvah Crocker, Charles J. Crocker, Douglas
19 Crocker, Samuel E. M. Crocker and Bigelow Crocker, John J. Riker, and Isaac T. Burr, trustees, plaintiffs, recover from said John F. Malley, former Collector, defendants, on the finding of the court, the sum of six thousand two hundred ten dollars and ninety-six cents ($6,210.96) damages and their costs of suit taxed at $—.

DEFENDANT'S BILL OF EXCEPTIONS.

[Filed February 1, 1922, Within Extended Time; Allowed March 13, 1922.]

This is an action of contract to recover back special excise taxes on capital stock paid under protest by the plaintiffs as trustees of Crocker, Burbank & Co., Assen., to the defendant, formerly Collector of Internal Revenue. Said taxes were assessed and paid under the requirements of Title IV, Section 407, of an act entitled "An Act to Increase the Revenue and for other purposes", approved September 8, 1916 (39 Stat. 756). The plaintiffs' declaration alleges in substance that the Crocker, Burbank & Co., Assen., is not an association subject to said taxes within the meaning of said Act. The defendant's answer sets up

(1) That the capital stock tax for the period from July 1, 1918, to June 30, 1919, referred to in the plaintiffs' declaration, was due and payable to the United States in accordance with Revenue Act

of 1918, Act of February 24, 1919, Chap. 18, Sections 1000 and 1004; Comp. St., Sections 5980 (*n*) and 5980(*r*);

(2) That it does not appear in the plaintiffs' declaration that plaintiffs have complied with the requirements of Revised Statutes, Sec. 3226; Comp. St., Sec. 5949;

(3) A general denial.

All of the material facts of the case are contained

(1) In the declaration of trust as modified by a supplementary instrument, which were annexed and made a part of the plaintiffs' declaration and which are incorporated in this bill of exceptions by reference;

20 (2) In the findings of fact made by the court and the documentary exhibits therein referred to and filed in this case.

This case was tried before Hon. James M. Morton, Jr., without a jury, who made and filed the following findings of fact hereinbefore referred to:

"The business in question began many years ago as a partnership under the name of Crocker, Burbank & Co. The partnership was succeeded by a Maine Corporation to which the partnership assets were transferred. About 1912 a Massachusetts corporation was organized to which seven of the eight mills and most of the real estate of the Maine corporation were transferred. The real estate not transferred to the Massachusetts corporation was leased to it by the Maine corporation. In consideration of this transfer and lease the Massachusetts corporation issued all its capital stock, except qualifying shares for officers, to the Maine corporation. The Maine corporation then conveyed all its assets, which consisted chiefly of the stock in the Massachusetts corporation and its reversionary interest in the leased real estate, to the trustees of a Massachusets trust, called the Wachusett Trust, who executed a declaration of trust and issued certificates. This left the Massachusetts corporation as the owning and operating company, with all its stock owned by the Trust. This Trust was before the Court in Crocker v. Malley, 249 U. S. 233, and was held not to be a joint stock company or an association, and not subject to the income tax in respect to dividends which the trustees received on the stock in the Massachusetts corporation.

"In 1917 the trust agreement was greatly modified, and the name was changed to Crocker, Burbank & Co., Association. In connection with this modification all the assets of the Massachusetts corporation were transferred to the trustees, and they assumed its debts. From July 1, 1917, to the present time the trustees have carried on

21 the business (paper manufacturing) formerly conducted by the Massachusetts corporation. They employ about one thousand persons and do a gross business of about $10,000,000 a year. The trustees elect a president, vice presidents, secretary, and treasurer, carry book accounts in the name of the association, make contracts, and generally do whatever is required in the conduct of the business. They make from time to time distributions of income or profits to the shareholders.

"The trustees were individually the owners of 38,640 shares out

of the 96,000 shares issued by them; and one of the trustees, together with Mr. Rackemann, who is not a trustee, holds in trust 18,000 shares. The remaining shares are owned by persons not trustees.

"No account designated as 'capital' account has been, or is, kept by the trustees. They charge themselves in a 'profit and loss' account with all the property transferred to them, at a valuation, and show against it liabilities and reserves. The balance is carried as the net interest of the shareholders. The books show 'dividends' disbursed to shareholders. No annual reports have been made by the trustees to the shareholders. There has never been a meeting of the shareholders nor any attempt to hold one. They have never in any way interfered or participated in the management of the business which has been done wholly by the trustees. The shareholders consented to the substitution of Mr. Burr as trustee in place of a trustee who resigned; and the shareholders of the original trust signed the instrument modifying it into the Crocker, Burbank & Co., Association, as above stated.

"The plaintiffs are, and were during the period here in question, the trustees of the Crocker, Burbank & Co., Association. They were required by the Treasury Department in July, 1918, to make a return for the capital stock tax as if the trust was a corporation, and
22 did so under protest that it was not a corporation and not taxable as such. A tax of $5,212 was assessed against them under the Act of 1916 for the year July 1, 1918 to June 30, 1919, and was paid by the plaintiffs under protest on January 3, 1919. On January 16, 1919, the plaintiffs duly filed a claim for the refund of this tax. After this claim had remained unacted upon for more than six months the plaintiffs brought this action.

"On February 24, 1919, the Revenue Act for 1918 was approved and became effective. It was retroactive in its provisions and covered the year from July 1, 1918 to June 30, 1919, for which the plaintiffs had just paid a tax on capital stock. It continued that tax and largely increased its amount. In April 1920 a further tax for the year referred to (July 1, 1918 to June 30, 1919) was assessed against the plaintiffs under the 1918 Act, amounting to $5,306. This sum represented the difference between the tax paid by the plaintiffs in January 1919 under the 1916 Act and the tax for that year as fixed by the 1918 Act. The plaintiffs paid it on April 20, 1920.

"The amount of both taxes was computed by the Collector by taking the fair value of the Association's assets over its liabilities and calling the difference 'capital stock' both under the Act of 1916 and the Act of 1918. A correct copy of the declaration of trust is annexed to the plaintiffs' declaration. The various other documentary exhibits introduced at the hearing may, for purposes of appeal, be regarded as forming part of this finding of facts."

The defendant requested the court to make the following rulings:

1. That upon all the evidence judgment should for the defendant.
2. That upon the law judgment should be for the defendant.
3. That upon the law and facts judgment should be for the defendant.

23 4. That the burden of proof is on the plaintiffs.

5. That Crocker, Burbank & Co., Association, is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.

6. That Crocker, Burbank & Co., Association, had capital stock and was carrying on and doing business during the period prior to July 1, 1918.

7. That Crocker, Burbank & Co., Association, was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918, to June 30, 1919.

8. That there has not been a compliance with the requirements of Revised Statutes, Sec. 3226, Comp. St. 5949.

The court made and filed the following memorandum of decision:

"Upon these facts I find and rule, for reasons stated in my opinion in Hecht v. Malley, filed this day, that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected.

"The defendant challenges the formal sufficiency of the proceedings with reference to the refund. The payment was made and the claim for refund filed before the 1918 Act had gone into effect. Subsequently, while the claim was pending, the 1918 Act came into force which constituted a new and larger tax 'in lieu of the tax imposed by * * * the Act of 1916'. The defendant contends that the later Act gives him the right to collect the tax even if he had previously collected it without right; and that therefore the refund proceedings under the 1916 Act were avoided by the 1918 Act.

"But the tax was illegal under both Acts. There was no right to collect it when it was paid, nor to retain it when the claim for refund was filed. The requirements of Rev. Stats, Sec. 3226 (U. S. Comp. Sts. Sec. 5949), having been complied with, were not superseded and rendered ineffective by the later Act.

24 "I give such of the requests for rulings and findings as are contained in or consistent with the foregoing findings of fact and memorandum of decision, including as part thereof the opinion in Hecht v. Malley above referred to; the others I refuse. Judgment for the plaintiffs."

The opinion in Hecht v. Malley referred to in the foregoing memorandum of decision is as follows:

"This case raises the question whether Massachusetts Trusts are subject to the tax on capital stock imposed by the Acts of 1916 and 1918. There is no controversy as to the facts; they are as shown by the plaintiff's testimony.

"A Massachusetts Trust is a peculiar form of business organization common in this State, which has frequently been considered in different aspects in the United States Supreme Court and in the Massachusetts Supreme Judicial Court.* In outline, it is an arrangement whereby property is conveyed to trustees who execute a declaration of

*Eliot v. Freeman, 220 U. S. 178; Crocker v. Malley, 249 U. S. 223; Malley v. Bowditch, 259 F. R. 809 (C. C. A 1st Cir.); Williams v. Milton, 215 Mass. 1; Dana v. Treasurer, 227 Mass. 563; Gleason v. McKay, 134 Mass. 419; Frost v. Thompson, 218 Mass. 360.

trust to hold and manage it for the benefit of such persons as from time to time shall own certificates which are issued by the trustees and are transferable, much like stock in a corporation. The legal title to the property is in the trustees and they are the active managers of the business. The details of the organization are prescribed in the declaration of trust and differ greatly in different trusts, especially with reference to the rights of the certificate-holders. Sometimes these are little, if any, greater than those of cestuis que trust under a will, the entire management and control of the enterprise being vested in the trustees. At the other extreme are organizations
25 in which the certificate-holders meet annually, elect the trustees annually, and have power to direct the trutees, as well as to remove them. The Massachusetts decisions classify these trusts as being either 'strict trusts', or partnerships; the former class comprising those in which the certificate-holders have substantially the same rights as cestuis under the usual testamentary trust, while in the latter the parties interested are regarded as partners who have entrusted the management of the enterprise to the trustees. In neither class does the organization derive any powers from statute, and in neither do the Massachusetts Courts recognize any entity apart from the persons of the trustees, or of the certificate-holders.

"The taxes here in question were levied under the Revenue Acts of 1916 (Sec. 407, Title IV, Act of Sept. 8, 1916) and 1918 (Sec. 1000 et seq.). The Act of 1916 provides that 'Every corporation, joint stock company, or association now or hereafter organized in the United States for profit and having a capital stock represented by shares and every insurance company now or hereafter organized under the laws of the United States, or any State or Territorry of the United States shall pay annually' &c. The Act of 1918 provides (Title X, Sec. 1000) that 'in lieu of the tax imposed by the first subdivision of Sec. 407 of the Rev. Act of 1916' * * * 'Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business equivalent to $1. for each $1,000. of so much of the fair average value of its capital stock * * * as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included.' On the face of this section the Hecht Trust was not within it. The tax was imposed because of the defining section of the Act of 1918 which provides, 'The term 'corporation' includes associations, joint stock companies and insurance companies; the term 'domes-
26 tic' when applied to a corporation or partnership means created or organized in the United States.'

"The Treasury Department held that the Hecht Real Estate Trust was an 'association' and therefore taxable as a corporation. It is not contended by the Government that the Trust was a 'joint stock company or an insurance company,' within the defining section quoted. Under the Treasury Regulations (Art. 7) some trusts are taxed under this statute, while others are not; trusts the members of which have all the liability of partners (see Horgan v. Morgan, 233 Mass. 381) are taxed as corporations; and the members may perhaps also be liable to taxation as partners. The underlying prin-

ciple on which the distinction is made is whether in each particular case the effect of the arrangement between the trustees and the shareholders was to cr-ate an organization distinct from the members who compose it. This was the point of view taken by Jessel, M. R., in Smith v. Anderson, 15 Chancery Div. 247, and ably expressed in his opinion. He was, however, reversed by the Court of Appeals (s. c. 15 Chancery Div. 273).

"The tax in question began with the Act of 1909, which imposed on 'every corporation, joint stock company, or association organized for profit and having a capital stock represented by shares, and every insurance company' a tax based on its net income. It was challenged as being an income tax and as such at that time unconstitutional; but it was sustained on the ground that it was not an income tax, but an excise tax. Flint v. Stone Tracy Co., 220 U. S. 107. And it was also held in Eliot v. Freeman, 220 U. S. 178, that Massachusetts Trusts were not subject to it, i. e., that they were neither joint stock companies or associations within its meaning. The tax of 1909 was in substance continued in the Act of 1916. But as that statute imposed a general income tax on corporations, it was recast and was based on capital stock. The tax
27 imposed by the Act of 1916 is by express language continued by the Act of 1918, and the provisions of the former Act are, with some modifications, retained in the later one.

"Decisions under the earlier acts are obviously of much importance in determining the meaning and scope of this one Eliot v. Freeman, 220 U. S. 178, establishes that the Act of 1909 imposed an excise tax on the privilege of doing business in corporate or 'quasi-corporate' (220 U. S. 151) form, i. e., in forms not recognized by common law which possess special advantages conferred by statute; and that Massachusetts Trusts are not such organizations. In Crocker v. Malley, 249 U. S. 223, such a trust was held not to be an 'association' the income of which was taxable under the income-tax Act of 1913. The radical differences between a Massachusetts Trust and a corporation are pointed out in the opinions in these cases and need not be repeated here.

"It is clear, I think, from the background and history of this tax and the decisions which I have referred to, that it is essentially an excise tax imposed on the privilege of doing business in corporate or 'quasi-corporate' form. The word 'association' is to be construed in the light of this general purpose and scope. The use in statutes and contracts of a word of great breadth in conjunction with words of much more limited scope, in such a way as to create doubt as to the meaning of the phrase, is not infrequent; it is usually resolved by restricting the broad word to a meaning in harmony with the general idea conveyed by the other words used in the same connection,—'nosc itur a sociis'. Both the other kinds of organization mentioned are characterized by important and distinctive powers derived from statutes. 'Association' was intended to bring under the tax all business organizations which resemble corporations and joint stock companies in that they invoke special statutory powers in

their organization. It was probably inserted out of abundant
28 caution in order that no such organization should escape. It ought not to be so construed as to change the basic character of the tax imposed; and I do not think that the omission of the words 'organized' etc., in the current statute, which has been urged in argument for the defendant, was intended to have that effect. The fact is that a Massachusetts Trust is fundamentally different from a corporation and is not within a statute dealing with corporations and similar organizations unless expressly specified. The persons interested are taxable as partners if the trust be of that character; otherwise as trustees and beneficiaries of a 'strict' trust.

"The statute under consideration in Crocker v. Malley, supra, taxed the income accruing 'to every corporation, joint stock company, or association and every insurance company organized in the United States, no matter how created or organised, not including partnerships.' If the words 'no matter how created or organized' be regarded as applying to 'associations',—as the Court assumed in its opinion,—it is hard to discover any substantial distinction between the scope of that statute and the one here in question as far as 'associations' are concerned; and that decision seems to be nearly conclusive of the present case.

"The detailed provisions of the statute tend to support this conclusion. They make 'capital stock' the basis of assessment. Most corporations and certain kinds of joint-stock companies have a stated capital, so carried on the books and divided into shares. Many Massachusetts Trusts have nothing of that sort, being in this respect like a testamentary trust. The trustees are charged with the property which comes into their hands, and the shares represent an aliquot part of it and of the income which it produces. There is no special fund designated as capital stock. The taxes here in question were assessed upon the entire net assets of the trust; and it is contended by the Government that 'capital stock' should
29 be so interpreted. But in the very next section to that under which the tax is levied the Act refers to 'invested capital', and taxes foreign corporations on that basis. The distinction between 'capital stock' and 'invested capital' is there recognized in the Act itself. The section also provides that 'in estimating the value of capital stock the surplus and undivided profits shall be included',—which is only applicable to organizations in which there is a capital fund distinct in bookkeeping from the other assets. Such a fund is required in the accounts of the ordinary corporation and many joint-stock companies; it is not required of a trust, although some of them do carry such an account.

"The only other question is whether the tax paid on July 26, 1919, amounting to $1,193, cannot be recovered because it does not explicitly appear that a formal protest was made at the time of payment. The plaintiff had made three previous payments that year of the same kind of tax, and in each instance had made a formal protest on the ground that it was not liable to the tax. Whether by oversight the plaintiff failed to file a written protest with his last and largest payment; or whether he did so and the protest and

the evidence of it have been lost, is hard to say. It is not necessary to make a finding upon it. There can be no doubt that the Collector knew the plaintiff's position on the matter, viz., that he objected to the tax on the ground that the Hecht Trust was not liable to it, and paid only because he felt compelled to do so under the demand made upon him. The Commissioner seems, either to have had before him a formal protest which has been lost, or to have so viewed the matter, for he made no point that the tax had been paid voluntarily and without the necessary protest. I find that this payment was not voluntarily made. (See Atchison, &c. Ry. v. O'Connor, 223 U. S. 280.)

"Upon all the evidence I make a general finding and ruling that the plaintiff is entitled to recover each of the sums claimed with interest.

"I give such of the requests for rulings and findings as are contained in and are consistent with the foregoing findings of fact and opinion; the others I refuse."

To the refusal of the court to make the several rulings as requested, the defendant duly excepted, and the defendant being aggrieved by said refusals to rule as requested files this his bill of exceptions, and prays that it may be allowed. Robert O. Harris, United States Attorney. Frederic S. Harvey, Assistant U. S. Attorney.

We assent to the allowance of the foregoing bill of exceptions. Dunbar & Rackemann, Attorneys for Plaintiff.

February 24, 1922.

March 13, 1922. Exceptions allowed. J. M. Morton, Jr., U. S. D. J.

PLAINTIFFS' EXHIBIT 5.

Certificate of Beneficial Interest.

No. —. (96,000.)

Crocker, Burbank & Co. Assen., Formerly the Wachusett Realty Trust.

This is to certify that —— ——, of ——, is entitled to — of the ninety-six thousand shares in the net proceeds of the property held under Declaration of Trust made by Alvah Crocker et ali., dated March 29, 1912, then known as "The Wachusett Realty Trust" as modified by instrument dated June 26, 1917, by which, inter alia, the name was changed to "Crocker, Burbank & Co. Assen.," when said property is converted into cash, and meantime to income, all as therein provided. Said original Declaration and said Modification are recorded with Worcester County, Mass. (No. Dist.) Deeds, and the terms of both said instruments are, by reference, made part hereof and expressly assented to.

The holder hereof has no interest, legal or equitable, in any specific property, and the interest hereby represented can be transferred only by due endorsement and surrender hereof and transfer noted on the books kept for the purpose by the Trustees or their Agent. Alvin Crocker, Charles T. Crocker, John J. Riker, I. Tucker Burr, Samuel E. M. Crocker, Douglas Crocker, Bigelow Crocker, Trustees, By Old Colony Trust Company, Transfer Agent. —— ——, Asst. Secretary. —— ——, Transfer Clerk.
Dated —— —, 19—. [Punched: J J J J.]

[On Back.]

Value received, the undersigned hereby sells, assigns and transfers unto —— —— — of the fractional interests or shares represented by the within certificate, and does hereby constitute and appoint —— —— true and lawful attorney irrevocable in the name and stead of the undersigned to make transfer accordingly on any books or records of the trustees. —— ——. Witness: —— ——.
Dated —— —, ——.

32 **PLAINTIFFS' EXHIBIT 6.**

Crocker, Burbank & Company, Assen.

Balance Sheet July 1, 1917.

Assets.		Liabilities.	
Cash	992,660 66	Purchase Ledger	551,723 31
Wachusett Realty Trust	373 18	Notes Payable	300,000 00
Notes Receivable	594,069 93	Reserve for Bad Debts.	299,072 80
Sales Ledger	1,526,997 52	" " Discount	128,415 06
Taxes Unexpired	25,532 73	" " General	500,000 00
Insurance Unexpired	25,594 12	" " Depreciation	1,037,029 55
Linton Bros. & Co.	30,000 00	Association Shareholders	9,877,105 16
Non Taxable Notes & Bonds	2,412,142 46		
Inventory	1,992,089 58		
Real Estate & Mchy.	5,093,885 70		
	$12,693,345 88		$12,693,345 88

FINDING OF FACTS AND MEMORANDUM OF DECISION BY THE COURT.

[Filed December 3, 1921.]

MORTON, *J.*: This is an action to recover back corporation excise taxes on capital stock assessed upon a Massachusetts trust.

I find the facts to be as follows:

[MEMORANDUM.—Findings of Fact and Memorandum of Decision are here omitted as they already appear of record being incorporated in defendant's bill of exceptions and will be found printed

on pages 20 to 24 of this Transcript of Record. James S. Allen, Clerk.]

DEFENDANT'S PETITION FOR WRIT OF ERROR.

[Filed March 21, 1922.]

Now comes John F. Malley, defendant in the above entitled cause, and says that on or about the thirteenth day of March, 1922, this court entered judgment herein, in which judgment and proceedings had prior thereunto in this cause certain errors were
33 committed to the prejudice of the defendant which appear herein of record.

Wherefore, the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the First Circuit for the correction of errors so complained of, and that a transcript of the record and proceedings in this case duly authenticated may be sent to said Circuit Court of Appeals. Robert O. Harris, United States Attorney. Frederic S. Harvey, Assistant U. S. Attorney.

Allowed. J. M. Morton, Jr., U. S. D. J.

DEFENDANT'S ASSIGNMENT OF ERRORS.

[Filed March 21, 1922.]

Now comes the defendant in the above entitled cause who has filed herewith his petition for writ of error and to review the judgment thereon entered in said cause on the thirteenth day of March, 1922, and files the following assignment of errors:

1. That the court erred in its denial and refusal of the defendant's request for ruling that upon all the evidence judgment should be for the defendant.

2. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law judgment should be for the defendant.

3. That the court erred in its denial and refusal of the defendant's request for ruling that upon the law and facts judgment should be for the defendant.

4. That the court erred in its denial and refusal of the defendant's request for ruling that the burden of proof is on the plaintiffs.

34 5. That the court erred in its denial and refusal of the defendant's request for ruling that Crocker, Burbank & Co. Association is an association within the meaning of the laws of the United States for the purpose of a capital stock tax.

6. That the court erred in its denial and refusal of the defendant's request for ruling that Crocker, Burbank & Co. Association had capital stock and was carrying on and doing business during the period prior to July 1, 1918.

7. That the court erred in its denial and refusal of the defendant's request for ruling that Crocker, Burbank & Co. Association was an association within the meaning of the laws of the United States relative to capital stock tax for the period from July 1, 1918 to June 30, 1919.

8. That the court erred in its denial and refusal of the defendant's request for ruling that there has not been a compliance with the requirements of Revised Statutes Sec. 3226, Comp. St. 5949.

9. That the court erred in finding and ruling that the plaintiffs were not taxable as a corporation and that the taxes in question were illegally collected. Robert O. Harris, United States Attorney. Frederic S. Harvey, Assistant U. S. Attorney.

35 **CITATION ON WRIT OF ERROR.**

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Alvah Crocker, Charles T. Crocker, Douglas Crocker, Samuel E. M. Crocker, and Bigelow Crocker, all of Fitchburg, in the District of Massachusetts; John J. Riker, of the City of New York, in the State of New York, in and Isaac T. Burr, of Milton, in the District of Massachusetts, Trustees of Crocker, Burbank & Co., Assen., under Declaration of Trust dated March 29, 1912, as modified by an instrument dated June 26, 1917, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twentieth day of April next, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the District of Massachusetts wherein John F. Malley, of Boston, formerly Collector of Internal Revenue for the Third District of Massachusetts, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts this twenty-fourth day of March, in the year of our Lord one thousand nine hundred and twenty-two. James M. Morton, Jr., U. S. District Judge.

36 *Acknowledgment of Service of Citation on Writ of Error.*

Service of the within citation is hereby accepted March 27, 1922. Felix Rackemann, Harrison M. Davis, Attorneys for Defendants in Error.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
District of Massachusetts, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the papers agreed upon by the parties as constituting the record upon the return on writ of error in the cause entitled No. 1151, Law Docket, Alvah Crocker et al., Trustees, Plaintiffs, v. John F. Malley, Former Collector of Internal Revenue, Defendant, in said District Court determined, together with the original Citation with the Acknowledgment of Service thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court, at Boston, in said District, this seventeeth day of April, A. D. 1922. [Seal]. James S. Allen, Clerk.

37 United States Circuit Court of Appeals for the First Circuit, October Term, 1921.

No. 1551.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant, Plaintiff in Error,
v.
ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

No. 1552.

ANDREW J. CASEY, Acting Collector of Internal Revenue, Defendant, Plaintiff in Error,
v.
ARTHUR L. HOWARD et al., Trustees, Plaintiffs, Defendants in Error.

No. 1553.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant, Plaintiff in Error,
v.
ALVAH CROCKER et al., Trustees, Plaintiffs, Defendants in Error.

No. 1554.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant, Plaintiff in Error,
v.
LOUIS HECHT, JR., et al., Trustees, Plaintiffs, Defendants in Error.

Error to the District Court of the United States for the District of Massachusetts.

Before Bingham, Johnson, and Anderson, JJ.

38 **OPINION OF THE COURT.**

June 6, 1922.

ANDERSON, *J.*: These cases involve the validity of taxes imposed upon business organizations, commonly known as Massachusetts Trusts, under the Revenue Acts of 1916 (39 Stat. 789) and 1918 (40 Stat. 1057). Nos. 1551 and 1552 involve the Haymarket Trust and we treat them as one case. The cases were argued as a group and may be conveniently dealt with in one opinion.

The chief business of the Haymarket and Hecht Trusts is that of owning, managing and leasing real estate, and distributing the net income to its shareholders. These concerns deny that they are associations within the meaning of the statutes.

The Crocker Trust is a large manufacturing concern. It admits that it is an association within the meaning of the statutes, but it claims immunity from the tax on the ground that it has no capital stock within their meaning.

The court below sustained the plaintiff's contentions in each case, and the government brought the cases here on writs of error.

The fundamental question is whether the plaintiffs are associations having a capital stock represented by shares, within the meaning of these provisions. So far as the issues in these cases are concerned, the provisions of the two statutes seem to us to be equivalent, for there is now presented no controverted question as to the amount of any tax; we therefore need not consider the different amounts exempt under the two statutes or the retroactive and substitutional effect of the 1918 statute.

The Act of 1916 levies a tax on associations "now or hereafter organized in the United States for profit and having a capital stock represented by shares * * * with respect to the carrying on or doing business by such * * * association * * * equivalent to 50 cents for each $1,000 of the fair value of its capital stock, and in estimating the value of capital stock the surplus and undivided profits shall be included. * * * The amount of such annual tax shall in cases be computed on the basis of the
39 fair average value of the capital stock for the preceding year,"—with an exemption not now material.

The Act of 1918, section 1, includes associations under the term "corporation"; and in section 1000 (*a*) provides for an annual "special excise tax with respect to carrying on or doing business equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year," etc. "In estimating the value of capital stock the surplus and undivided profits shall be included."

Both acts are conceded to levy an excise tax with respect to doing business, the amount of the tax being measured by the average value of the capital stock, including any surplus and undivided profits as a part thereof. All the plaintiffs agree that they are doing business within the meaning of these acts.

While we recognize that in applying this and every other tax statute reasonable doubts must be resolved in favor of the tax payer (Gould v. Gould, 245 U. S. 151) yet revenue acts are not penal statutes; the Government is not to be crippled by strained and unnatural construction of tax statutes fairly plain.

Cliquot's Champagne, 3 Wall. 114, 145.
United States v. Hodson, 10 Wall. 395.
Worth Brothers v. Lederer, 251 U. S. 507.

Taxation of this general kind began with the passage of the Act of August 5, 1909 (36 Stat. 11, 112), which imposed a tax "on every corporation, joint-stock company or association organized for profit and having a capital stock represented by shares * * * now or hereafter organized under the laws of the United States or of any state or territory * * * with respect to the carrying on or doing business by * * * such corporation, joint-stock company or association * * * equivalent to one per cent upon the entire net income over and above $5,000," etc.

This statute, passed before we had the 16th amendment, was attacked as an income tax and therefore unconstitutional. But the Supreme Court held that it was not an income tax, and sustained it as an excise tax. Flint v. Stone Tracy Co. (1911), 220 U. S. 40 107. It was measured by the income,—not as under the present law, on the capital used.

In Eliot v. Freeman, 220 U. S. 178, the court at the same time held the Act of 1909 not to cover two typical Massachusetts real estate trusts, on the ground that, "The language of the act, 'now or hereafter organized under the laws of the United States,' etc., imports an organization deriving power from statutory enactment." Organized as purely non-statutory, they were exempt.

The gist of the present case is whether the statutes of 1916 and 1918 are, as the plaintiffs contend, to be given the same interpretation in favor of exempting such organizations as was given by the Supreme Court to the Act of 1909.

The government, on the other hand, contends that the language of the acts is plainly applicable to such organizations; that the history of the legislation shows that Congress intended to avoid the result reached in Eliot v. Freeman, supra, and that there are no applicable decisions of the courts supporting the plaintiffs' position. We think the government is right, and that the court below erred in holding that such organizations are not associations within the meaning of these Revenue Acts.

The language of the statutes, supra, seems so plain that repetition and paraphrasing would add nothing.

The history of the legislation lends emphasis to the initial impression of its import. For it is elementary, that when language used in an earlier statute has in application received judicial construction, change in language in later analogous legislation imports legislative purpose to attain a different result. If Congress had intended the acts in question to have the restricted application given

by the Supreme Court to the Act of 1909, there was no conceivable reason for changing the words "organized under the laws of the United States or of any state," etc., etc., to "organized in the United States."

We think it plain that by this change Congress intended in the later acts to include non-statutory organizations, and to avoid the restriction found by the Supreme Court in the words of the 1909 act. We cannot accord with the learned District Judge in
41 his view that "it is hard to discover any substantial distinction between the scope of" the Act of 1909 and the Acts of 1916 and 1918 "as far as 'associations' are concerned." We think there is a vital and controlling distinction.

Eliot v. Freeman was decided in 1911. In 1913 an income tax act was passed (38 Stat. 114, 166), imposing such tax "on every corporation, joint-stock company, or association, and every insurance company organized in the United States, no matter how created or organized, not including partnerships." The original case of Crocker v. Malley, 249 U. S. 223, the plaintiffs' chief reliance, arose under this statute. Sitting as District Judge, Judge Bingham, in July, 1917, held the Wachusett Realty Company, the predecessor of the present Crocker Association, a trust, according in that regard with Judge Hale in a decision made on May 23, 1914, in the case of Crocker v. Crocker.

But in this court (250 Fed. 817) the organization was held an association within the meaning of the statute. The Supreme Court reversed this court, adopting the view of the District Court. The decisions, both in the Supreme and District Courts, against the government, turned upon the fact that the shareholders had no real control over the trust estate; so that it therefore fell within the doctrine of Williams v. Milton, 215 Mass. 1, from the opinion in which Mr. Justice Holmes quoted (249 U. S. 223, 232) as follows:

"There can be little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more. 'The certificate holders * * * are in no way associated together, nor is there any provision in the [instrument] for any meeting to be held by them. The only act which (under the [declaration of] trust) they can do is to consent to an alteration * * * of the trust' and to the other matters that we have mentioned. They are confined to giving or withholding assent, and the giving or withholding it 'is not to be had in a meeting, but is to be given by them individually.' 'The sole right of the cestuis que trust is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end."

42 The trustees of the Wachusett concern held title, subject to a long lease, to eight mills, and to the stock of the corporation operating these mills, and distributed the net income to the eight beneficiaries of the trust. The trustees were not managing the mills: the organization was not a business enterprise within the normal use of that term. The beneficiaries were "admitted not to be partners in any sense * * * have no joint action or interest

and no control over the fund." 249 U. S. 234. The court, in referring to the phrase in the statute "no matter how created or organized," says:

"The trust that has been described would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not." Citing Smith v. Anderson, 15 Ch. Div. 247, 273, 274, 277, 282.

Moreover, the tax then sought to be sustained was levied, at least in substantial part, in respect of dividends received from a corporation that itself was taxable upon its net income. The court therefore held that "as the plaintiffs undeniably are trustees, if they are subjected to a double liability the language of the statute must make the intention clear. Gould v. Gould, 245 U. S. 151, 153."

It is thus apparent that the Wachusett Realty Company was in organization and purpose but an ordinary inter vivos trust for eight beneficiaries; also that the tax sought to be imposed would have resulted in double taxation, never easily inferred. It was in nature, and in relations to its shareholders and to society at large, radically different from the plaintiffs' organizations, described below. That decision lends no support to the plaintiffs' contention.

Next in chronological order was the stamp tax provision of the Act of October 22, 1914 (38 Stat. 745, 775). This act imposed a stamp tax on "each original issue * * * of certificates of stock by any association, company or corporation." This court in Malley v. Bowditch, 259 Fed. 809, held such tax applicable on the original issue of certificates or shares of the Pepperell Manufacturing
43 Company "a manufacturing company organized in the form of a trust under the common law, and deriving none of its rights, qualities or benefits from any statute." The crucial question in that case, as in the case at bar, was whether the organization was an association within the meaning of the Federal Tax Act. The case is, in essentials, difficult, if not impossible, to distinguish from the cases at bar. The cogent opinion of Judge Brown is applicable to most aspects of the present problem. It might well be quoted from at length.

The Revenue Acts of 1916 and 1918, supra, both in their income and excise tax provisions, adopt the same broad phrasing as to joint stock companies or associations "organized in the United States," thus showing a continuing legislative purpose to avoid the limitation found by the Supreme Court in Eliot v. Freeman, supra, arising out of the language "organized under the laws of the United States or of any state," etc.

Plainly, there is nothing in this history of legislative and judicial dealing with the matter, lending support to plaintiffs' contention that Congress intended to exempt such business organizations as the plaintiffs. Rather does the history support the natural construction of the acts in question.

We find nothing else in the history of the legislation concerning this and analogous forms of taxes, nor in other cases cited, tending to uphold the plaintiffs' contentions or otherwise calling for analysis and discussion.

A brief description of the three plaintiffs' organizations will conveniently precede our final considerations. We take first the Hecht case, agreeing with learned counsel that it is the strongest case for the plaintiff.

On superficial examination, this organization looks somewhat like a family affair, making provision for members of the Hecht family, immature or otherwise unfitted for business reponsibilities. But, on analysis, we find the organization is a very genuine business concern.

In 1899, members of the Hecht family holding as tenants in common real estate on Federal Street and Atlantic Avenue, Bos-
44 ton, conveyed it to Jacob Hecht, who declared a trust for twelve beneficiaries all named Hecht, who received certificates transferable like ordinary corporation shares, but with a restriction in favor of lineal descendants of Elias Hecht, and, on certain contingencies not now important, to be offered to the trustee before sold to an outsider. The restriction is analogous to the close-corporation provision dealt with in New England Trust Co. v. Abbott, 162 Mass. 148. It is in no way peculiar to a trust as distinguished from a corporation. While the Hecht trustee has broad general powers of management, including power to buy and sell, the seat of real power is with the shareholders and not with the trustee; for three-fourths of the shareholders may remove the trustee, three-fifths may terminate the trust or give him binding instructions, and also,—what is of vital importance,—modify the instrument in any particular. This power to modify covers, potentially, the right to extend or change the business so as to make it as large and as corporate in form and function as the Crocker concern, which admits that it has evolved into an association. The Hecht organization is not a trust within the doctrine of the Massachusetts decisions. Williams v. Milton, 215 Mass. 1. Compare Crocker v. Malley, 249 U. S. 223; In re Associated Trust, 222 Fed. 1012. The Hecht trustee has made annual statements showing the assets, liabilities and net income, and kept books, containing a capital account and surplus account. Its stockholders have, sensibly and we think legally, treated their dividends like corporation dividends, in their income tax returns. They have thus by conduct, presumably under the advice of counsel, denied that they are partners taxable under the Act of 1918, sec. 218 (*a*).

Parenthetically, we note that counsel do not contend that the shareholders of any of these plaintiff associations are partners. There is no suggestion that any of the shareholders in any of the plaintiff organizations have made, propose to make, or could make, tax returns as partners in these business concerns. Manifestly, counsel would deprecate such result as imposing burdens probably
45 much heavier,—certainly difficult if not impossible of ascertainment,—upon the shareholders in such organizations. Their quest is tax exemption, not tax substitution. Compare Dana v. Treasurer, 227 Mass. 562, 565; Frost v. Thompson, 219 Mass. 360.

Plainly the Hecht Trust is quasi-corporate in form and power. It is an association within the meaning of the Revenue Acts.

The Haymarket Trust, both in genesis and organization, is even more like a corporation. It has none of the aspects of a family

affair. It started by securing from the investing public $250,000 on solicited subscriptions, the trustee paying a commission of $2,500 to the promoter for thus raising the capital for doing business. The declaration of trust provides for nearly all the machinery and proceedings of an ordinary corporation. We hold it also to be quasi-corporate and an association within the meaning of the Revenue Acts.

Learned counsel in the Crocker case admit that it is an association, but claim exemption on the ground that the concern has no capital stock. This association was evolved from the Wachusett Realty Trust, above referred to. As there pointed out, the shareholders had under the Wachusett declaration no power to amend without the assent of the trustees. But in June, 1917, shareholders and trustees both agreeing, the organization was radically altered. Its name was changed and in express terms it agreed that its form should thereafter be "changed to that of an association," with power to take over and carry on the extensive manufacturing business previously carried on by the corporation whose stock it had held, or any substantially similar business.

The new organization conforms closely to the corporation model,—in powers, in official personal, and in methods of doing business. It has issued 96,000 shares of no par value, transferable like corporation stock, but with a restriction somewhat like that in the case of New England Trust Co. v. Abbott, supra.

Conceding that it is an association with transferable shares, this plaintiff yet seeks exemption on the ground that it has attached no par value to its 96,000 shares. It admits that if it had attached a par value of, say, $100 to each of these shares, making a
46 capital account of $9,600,000, a little less than is shown on its balance sheet of July 1, 1917, where the interest of the shareholders is put down as $9,877,105.16,—the concern would have had a capital stock represented by shares, and thus be an association within the meaning of the Revenue Acts, supra.

We cannot adopt this scholastic and artificial distinction. Cf. Worth Bros. v. Lederer, 251 U. S. 507, 510. It is for present purposes immaterial whether the stock of a corporation, of an association, or a joint-stock company has or has not par value. Compare Gen. Laws of Mass. chap. 156, secs. 14, 15, 47. Stockholders, whether a definite value is or is not attributed to their shares, severally or in mass, own beneficially the net value of the corporation's assets,—that is, whatever may remain after discharging debts. See

Hood Rubber Co. v. Commonwealth, 238 Mass. 369, 371.

Cook—"Stock Without Par Value", Am. Bar Ass'n Journal October, 1921.

Hollen and Tuthill "Stock Having No Par Value", Am. Bar Ass'n Journal, November, 1921, p. 578.

Colton "Par Value v. No Par Value Stock", Am. Bar Ass'n Journal, December, 1921, p. 671.

Compare also Eisner v. Macomber, 252 U. S. 189, 209 et seq.

Congress intended that this tax should be measured by the average

amount of capital used during the tax year in doing the business. The phrase in the statutes as to "including surplus and undivided profits" puts beyond doubt the question of the Congressional intent to measure this tax by business and financial realities, not by bookkeeping forms or mere names. "Fair value" and "fair average value" carry the same notion. Cf. Wright v. Georgia R. R. et al., 216 U. S. 420, 424, 425.

The Crocker Association cannot escape taxation, falling on its competitors, by adopting the modern theory of no par value for its stock. The presumption is against such immunity; it savors of special privilege. Compare United States v. Dickson, 15 Pet. 141, 165.

47 It is a matter of common knowledge that, for most business and financial purposes, all the larger organizations of this sort have for years been indistinguishable from corporations. One might almost say that they are a device under which parties make their own corporation code. Business concerns so organized have come to occupy a large field in industry and in finance. At least two substantial text-books have been written on the law concerning such organizations and dealing with their advantages for general business purposes. See Sears, Trust Estates as Business Companies, 1st Ed. 1912, 2d Ed. 1921. Note the long list of industries so organized referred to on pages VI and VII of the preface of the 1921 edition. See Wrightington on Unincorporated Associations, 1916. In Dana v. Treasurer, 227 Mass. 562, 565, it appears that the Amoskeag Manufacturing Company, commonly known to be one of the largest enterprises in New England, is so organized. The Pepperell Manufacturing Company, before this court in Malley v. Bowditch, supra, had a capitalization of over $7,500,000; the Crocker Trust operates large paper manufacturing mills, employing about 1,000 men, with gross assets of over $10,000,000.

Such concerns have long been recognized as quasi-corporate in form. In 1904, Chief Justice Knowlton in the Massachusetts Supreme Court said of a typical one of them, in Hussey v. Arnold, 185 Mass. 202:

"The agreement creating the trust has peculiar provisions. The object of it, apparently, was to obtain for the associates most of the advantages belonging to corporations, without the authority of any legislative act, and with freedom from the restrictions and regulations imposed by law upon corporations."

No amplification of words could more accurately and adequately characterize this sort of business organization. Other cases in the Massachusetts reports concerning them abound in similar observations as to their resemblance to corporations. Williams v. Milton, 215 Mass. 1, and cases cited. See Williams v. Boston, 208 Mass. 497; Phillips v. Blatchford, 137 Mass. 510, 515; Tyrrell v. Washburn, 6 Allen, 466, 474.

48 But the proposition that they are quasi-corporate in form need not rest merely on our own analysis or on observations found in the decisions of the Massachusetts courts. It has now been distinctly recognized by the Massachusetts legislature; they have a statutory status as associations, not as trusts or as partnerships.

In the decision below, these organizations have been treated as having no status not arising out of the common law; so also in the briefs of the government and of counsel for the defendant. It seems to have been overlooked that they have acquired in Massachusetts a distinct statutory basis. This, if the question before us were otherwise doubtful, would seem to us of much significance. See General Laws of Mass. (1921), c. 182, codifying earlier legislation of 1909, 1913, 1914, 1915, and 1916. Compare also Acts of 1921, c. 368. The title of this chapter is "Voluntary Associations."

In section 1 of this act, dealing with definitions, it is provided:

"'Association,' a voluntary association under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares." This definition exactly fits the plaintiffs at bar.

In section 2, it is provided that the written instrument or declaration creating the association shall be filed with the Commissioner of Corporations, and with the clerk of every town where such association has a usual place of business. Section 5 requires the Commissioner to transmit to the Secretary of State copies of such instruments or of any amendments filed during the previous year, to be printed as a public document. The instruments creating such associations are thus made even more generally accessible than are ordinary corporation charters.

Sections 3 and 4 and 7 to 11 deal specially with associations owning stock of public utility companies; they need no present comment.

Section 6,—a re-enactment of the Act of 1916, c. 184, passed subsequent to all the Massachusetts decisions cited and relied upon by the plaintiffs,—has probably the most direct bearing on our present problem; it is as follows:

49 "An association may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees, or by the duly authorized agents of such trustees, or by any duly authorized officer of the association, in performance of their respective duties under such written instruments or declarations of trust, and for any damages to persons or property resulting from the negligence of such trustees, agents or officers acting in the performance of their respective duties, and its property shall be subject to attachment and execution in like manner as if it were a corporation, and service of process upon one of the trustees shall be sufficient.

Here is a distinct enactment that such associations shall be suable in like manner as if corporations. An organization described as an association and made generally liable "to attachment and execution in like manner as if it were a corporation" cannot easily be held a partnership or a trust.

We are not called upon to deal with the confusing and perhaps irreconcilable decisions in the Massachusetts courts concerning the nature and legal incidents of these associations, most of which were made before the passage of this Act of 1916, or with the effect of this legislation upon their powers and liabilities,—except so far as pertains to our single problem of determining whether these associations are liable to Federal taxation under the Revenue Acts, supra.

We intimate no opinion on any other question. But when a Massachusetts statute has described such organizations as associations, and has put their liability to ordinary creditors apparently on the same basis as that of corporations, we have no hesitation in reaching the conclusion that they have now been given a statutory basis as quasi-corporate, and that they are associations within the meaning of the Federal Statutes, as well as under the Massachusetts Statutes. We cannot hold Massachusetts associations, liable under Massachusetts Statutes to ordinary creditors as though corporations, not liable under Federal Statutes to taxation imposed generally on corporations, joint-stock companies and associations.

It may be argued that these statutes are distinguished from corporation acts in that their chief functions are to regulate or
50 restrict, whereas corporation acts also empower. Technically, that may be so. But the powers of these voluntary associations are in many respects greater, and the regulations and restrictions less, than in the case of corporations. Broadly speaking, their promoters select and definite such powers and provide such limitations of liability, as they desire. Cf. Hussey v. Arnold, supra. If and in so far, therefore, as the tax in question is directed at "the privilege" or power of doing business through large organizations,—and particularly at the power to obtain money from the outside public on transferable shares,—voluntary association offers at least as much "privilege" as does any corporation form of organization. Associations are resorted to, not because thought weaker, but because thought stronger, than corporations.

If, in construing the statutes, we may look at the policy Congress probably desired to adopt, it could not be overlooked that the plaintiffs' contention, if sustained, would amount to a discriminatory immunity in favor of a kind of business organization, the nature and activities of which have hitherto been the subject of much question and investigation. See the Report of the Tax Commissioner of Massachusetts on Voluntary Associations, under Resolves of 1911, c. 55,—a very interesting document,—in which Commissioner Trefry ably reviewed their origin, history and legal incidents, both in England and in this country; referring, passim, and particularly on page 13, to many other documents and legislative reports concerning them. See also a report of the Special Commission to Investigate Voluntary Associations, January, 1914, made under Mass. Resolves of 1912, c. 113. In the Resolve of 1911, c. 55, the Commissioner was required to make an investigation "with a view to determine" inter alia, "Whether * * * their prohibition * * * is advisable in the public interest."

There is, we think, no conceivable reason why Congress should have desired to favor organizations of this questioned sort by exempting them from taxation to which their competitors in corporate form are subjected. The presumption is plainly the other way. Modern corporation laws furnish adequate machinery for carrying on every legitimate form of business, including now that of dealing
51 in real estate. See Gen. Laws of Mass. chap. 156, passim; sec. 7, authorizing real estate corporations. There is no pres-

ent reason for resorting to this form of organization, except on the theory that more "privileges of doing business" may be thus acquired than by conforming to our broad and elastic corporation laws. To hold that Congress intended to discriminate in their favor would be to disregard the letter, the spirit and the reason of the acts.

Our views accord with those expressed by Judge Page in Chicago Title & Trust Co. v. Smietanka, 275 Fed. 60. The reasoning of Judge Morton in the Associated Trust case, 222 Fed. 1012, where he reached the conclusion that such an association was an "unincorporated company" within the meaning of the Bankruptcy Act, seems to us to sustain our conclusions rather than those reached by the learned Judge in the instant cases.

We may summarize our conclusions as follows:

(1) The natural interpretation of the language used in the Acts of 1916 and 1918 would include plaintiffs' organizations as associations.

(2) The contrast between the language used in the Act of 1909 "organized under the laws of the United States or any State", etc., and in the Acts of 1916 and 1918 "organized in the United States", shows that Congress intended to avoid the result reached in 1911 by the Supreme Court in Eliot v. Freeman.

(3) The manifest general purpose of Congress was to tax business deriving powers and making profits from associations, particularly business done by organizations getting all or a substantial part of their capital on transferable shares, such as are commonly sold to the investing public.

(4) Prior to the passage of either the Revenue Act of 1916 or 1918, the Massachusetts Legislature had by the Acts of 1909 and 1914 expressly recognized such organizations as associations. Congress used the word "association" as the Massachusetts Legislature had previously defined and used it.

(5) By the Act of 1916, the Massachusetts Legislature made such associations liable to creditors in like manner as if cor-
52 porations; by analogy they have similar liability to the Federal Government for taxes.

(6) The case of Malley v. Crocker, 249 U. S. 223, makes, on analysis of the Wachusett Trust and the reasoning of the court, not for the plaintiffs but for the government. One ground of that decision was to avoid unjust, discriminatory, double taxation; whereas, to sustain the plaintiffs' contention, would create discriminatory immunity for a large class of business organizations, thus giving them an unfair advantage over their incorporated competitors.

(7) The conclusion now reached accords with the reasoning and decision of this court in Malley v. Bowditch, 259 Fed. 809.

In each case the judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with his opinion; the plaintiff in error recovers costs in this court.

53 [Title omitted.]

PETITION FOR REHEARING.

To the Honorable the Justices of the United States Circuit Court of Appeals for the First Circuit:

Come now Alvah Crocker and others, trustees, and respectfully petition the court for a rehearing in the above-entitled cause, in which the opinion of the court was rendered by Mr. Justice Anderson, June 6, 1922, whereby it was ordered that

"the judgment of the District Court is reversed and that the case is remanded to that court for further proceedings not inconsistent with this opinion; the plaintiff in error recovers costs in this court."

As reasons for this petition, without intended argument, the following may be briefly stated:

1. This case was argued with three others, and we feel very strongly that the plaintiffs in this Crocker case suffered from
54 being considered one of a group, when, in point of fact, the Crocker case rested upon a basis entirely separate and distinct from the others. That they were considered by the court as a "group" without appreciation of the distinction, would seem to appear from the language of the court (Opinion, page 7): "We take first the Hecht case, agreeing with learned counsel that it is the strongest case for the plaintiffs."

2. In so far as the opinion of the court deals with the question whether the principle established by the case of Eliot v. Freeman, 220 U. S. 178, applies, we have nothing to suggest, and with the decision of the court that the principle of Eliot v. Freeman does not apply, we make no present quarrel. *That point was not discussed upon our brief in the case at bar, nor was it mentioned by us in argument.*

3. It was *not contended* by the government that Crocker, Burbank & Co. was a corporation, and, on the other hand, it was *admitted* by the plaintiff's that Crocker, Burbank & Co. was an association within the meaning of the Federal Acts.

4. In each of the other cases there was clearly a "capital" and a "capital stock": association was denied. In the Crocker case, on the other hand, association was admitted and the only question was whether Crocker, Burbank & Co. had a "capital" and "capital stock."

5. The single point stressed by the Crocker plaintiffs, both in brief and argument, was that the tax in question (both under the Act of 1916 and under the Act of 1918) was laid only upon organizations having a "capital stock," and not merely a general property account.

The words of the Act—"fair average value of its capital stock" and "in estimating the value of capital stock"—would seem to make this undeniably clear.

6. This tax was first imposed by the Act of 1916.

After two years' experience the Act of 1918 was substituted, and

cerns in one form of words, the measure being "capital stock" (sec. 1). Similar taxation was imposed upon *foreign* concerns, 55 the measure being "capital employed in the business" in the United States (sec. 2).

The difference in wording is not careless; it is studied. It is not meaningless; it is most significant.

The Opinion ignores the difference and treats the Act as if the language were the same in the two sections.

It would, of course, have been competent for Congress to tax the domestic association upon the basis of the "capital employed in its business," but it, very plainly, did not do so.

Nowhere in the Opinion is found any allusion to, or discussion of, this marked contrast, in the wording of the statute itself, between the "capital stock" of *domestic* corporations and "the average amount of capital employed in the transaction of its business in the United States" of *foreign* corporations. The Opinion deals with the two expressions as synonymous, and we cannot avoid the feeling that the court has unwittingly overlooked this evidently intended and significant difference.

7. The Opinion (in the first two lines of page 4) makes it clear that all distinction between "capital stock" and "capital employed in the business," is either overlooked or ignored; else the court could not have said that the tax was *measured* "under the present law on the *capital used*" (italics ours).

Furthermore, Malley v. Bowditch is referred to and discussed in error. The vital fact which differentiates it from this Crocker case is overlooked. The court says (Opinion, page 7) that Malley v. Bowditch is "in essentials, difficult, if not impossible to distinguish from the cases at bar." The first error is in this evident grouping of the cases at bar as alike, while the Crocker case is wholly unlike the rest. The second error is in the oversight that it was solely because the Pepperell Manufacturing Company had a definitely stated and allocated capital that the court found that its shares constituted a capital stock, and were consequently taxable.

It is respectfully submitted that the court, in its consideration and discussion of no-par-value shares and shares with par value, 56 lost sight of the exact language of the statute and so has been led (inter alia) to the statement (Opinion, page 10) that "Congress intended that this tax should be measured by the average amount of capital used during the tax year in doing the business."

It is respectfully submitted that that is exactly what Congress intended and did in the case of foreign corporations under section 2 of the Act, but is not what Congress either intended or did as to domestic corporations under section 1 of the Act, in which the language is so different that its significance cannot reasonably be ignored. To say that "capital stock" and "amount of capital employed" are synonymous is to substantially say that the clear basis of the decision in Malley v. Bowditch was erroneous.

The tax involved in Malley v. Bowditch was a documentary tax on "certificates of stock," and the point decided was that certificates issued by an unincorporated voluntary association with transfer-

able shares are "certificates of stock," if (but only if) there be a fixed or allocated capital.

The Declaration of Trust in that case provided as follows:

"The capital of this trust shall be seven million six hundred and sixty-eight thousand dollars ($7,668,000), divided for the purpose of issuing certificates into 76,680 shares, of the par value of one hundred dollars ($100) each."

The court said (259 Fed. at 810):

"There was thus provided a share capital as a basis for the issue of transferable certificates evidencing a proportional interest therein and carrying with them certain rights. * * *"

Further, on page 811, the court says:

"By agreement the certificates in question were issued as
57 evidence of shares of a fixed capital, divided into a fixed number of shares, of the par value of $100 each.

"We are called upon to apply a statute imposing stamp taxes on documents of a certain class, and which assumes that these documents may be issued, not only by corporations, but by associations and companies. These may have this in common—a share capital of fixed amount. Whether the share capital is fixed by agreement or under statutory authority seems immaterial. * * *"

In the Crocker case the record shows that there was no "capital" fixed in any way whatever, and the only provision for certificates is in Article 4 of the original trust declaration, authorizing the trustees to "issue proper receipt certificates" which should "conclusively evidence the ownership of respective interests."

8. That the court has failed to appreciate our contention and argument in this Crocker case is further shown by the language of the Opinion at the foot of page 9, where the court says that "this plaintiff yet seeks exemption on the ground that it has attached no par value to its shares." It is respectfully submitted that no such argument was made by us either on the brief or orally. Our contention was that the association had never had any stated or allocated capital divided into or represented by shares, and that the certificates of beneficial interest represented merely fractional interests in a mixed fund, in part accumulated income, and all held in trust for the associates. Having no "capital" it can have no "capital stock" (cf. last paragraph of Opinion, page 10).

9. As an important and perhaps compelling reason for a further argument and consideration of this case we submit the following: It is evident from the Opinion that the consideration of no-par-value shares was given much weight. In this connection it will be remembered that that subject was not referred to on any brief, and arose, de novo, at the argument.

58 It will also be realized that no-par-value shares are a new creation of the law and, like all others, bound to create some confusion before they find their settled place.

The court makes no reference to, and apparently has overlooked,

some important statutes in this connection. For example, the new statute in Massachusetts makes it clear that, at least in this state, no-par-value shares are not part of the "capital stock," nor to be included as liabilities. On the contrary, they are excluded (Gen. Laws, c. 156, sec. 47, par. 6).

And in the Agreement of Association, Articles of Organization and Certificate of Incorporation only shares having some par value are treated a scapital stock (see Gen. Laws, c. 156, secs. 6, 10, 12).

On the other hand, in New York the statute is quite different, and in that state the Certificate of Incorporation must in every case specify a stated amount of capital to be paid in, and "the amount of capital stock" of no par value, "shall be deemed the aggregate amount so specified in the certificate," etc. There is no similar provision in Massachusetts (New York Stock Corporation Law, secs. 19, 20, and 23).

It is clear, therefore, that, in Massachusetts, no-par-value shares are, by the very statutes creating them, not part of the "capital stock"—and on the same principle, or by analogy (if there be any) the certificates of beneficial interest of Crocker, Burbank & Co. cannot be "capital stock."

10. To the first, second, fourth, fifth, and sixth conclusions of the Opinion (page 15) we take no exceptions; but to the third conclusion, that it was the "general purpose of Congress to tax business deriving powers and making profits from association," "getting all, or a substantial part of their capital on transferable shares," we do take exception, because that conclusion is at clear variance from the statute itself, making "capital stock" and not "transferable shares" the essential item.

11. It is further suggested that under the decision of the court the basis of the tax assessment on domestic and foreign corpora-
59 tions is found to be the same, namely, the total property invested in this country.

In this connection the court will, of course, appreciate that the regulations and forms issued by the Treasury Department have the force of law in so far as consistent with the law, and we therefore beg the court to examine the forms of return and special instructions issued by the Treasury Department under the Act of 1916 (Form 707, revised June, 1918) and similar form issued under the Act of 1918 (Form 707, revised February, 1921), comparing those forms with the corresponding forms and instructions issued under the two Acts for foreign corporations.

We submit that a comparison of these forms will make it clear, beyond a doubt, that the Treasury Department has uniformly regarded and treated domestic and foreign corporations on the basis, as provided in section 1 and section 2, respectively, of the Act, dealing with "capital stock," strictly so called, in the case of the domestic corporations; and with "capital employed in the business" in the case of the foreign corporations.

The court will probably be slow to decide that these forms and regulations have been wrongfully established ab initio. We beg to submit copies of the forms above referred to with this petition.

The decision may also go dangerously far. Congress made "capital stock" the measure for domestic corporations.

It is, of course, common knowledge that the market value of a corporation's capital stock may be very much higher than the value of the "property used" in its business.

A decision of the United States Court for the Southern District of New York, rendered only last month, and which has just come to our notice, should surely have the con sideration of this Court in this connection.

Central Union Trust Co. v. Edwards, Collector, etc. (Corporation Trust Co. "War Tax Service" Report).

The case arose under the Statutes here in question. The plaintiff contended for substantially the conclusion adopted by this Court in its opinion, but failed. This Court would doubtless wish to see that opinion before finally deciding this Crocker case.

In conclusion we desire merely to suggest that the question really at issue here is, not a question involved in mere private litigation, but is a broad fundamental question as to the construction of a Federal Tax Act applying not merely to the plaintiffs in this
60 case, but to many others, and that the right decision is therefore important from a broad and public, and not a merely private, aspect.

We very respectfully ask the court's leave to be further heard. Dunbar & Rackemann. Felix Rackemann, Harrison M. Davis, Of Counsel.

I, Felix Rackemann, of counsel in the above-entitled cause, hereby certify (under Rule 29) that, in my opinion, there is such probable ground for the foregoing petition for rehearing as to make it a fit subject for judicial inquiry and examination, and that the same is not intended or filed for delay, but only with great deference and with the conviction that matters of public as well as private interest are involved. Felix Rackemann.

June, 1922.

61 On April 27 and 28, 1922, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on the sixth day of June, A. D. 1922, the opinion of the court (page 37) was announced and the following Judgment was entered:

JUDGMENT.

June 6, 1922.

This case came on to be heard April 27 and 28, 1922, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, June 6, 1922, here ordered, adjudged and decreed as follows: The judgment of the

District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the plaintiff in error recovers costs in this court. By the Court. Arthur I. Charron, Clerk.

Thereafter, to wit, on the thirteenth day of June, A. D. 1922, a petition for rehearing (page 53) was filed by defendants in error, and on the twenty-fourth day of June, A. D. 1922, the following Order of Court was entered:—

ORDER OF COURT.

June 24, 1922.

No judge who concurred in the judgment entered June 6, 1922, desiring a rehearing, It is ordered that the petition for rehearing filed June 13, 1922, be, and the same hereby is, denied.

By the Court. Arthur I. Charron, Clerk.

Thereafter, to wit, on the thirtieth day of June, A. D. 1922, the following Motion for Stay of Mandate was filed:—

62 **MOTION FOR STAY OF MANDATE.**

[Filed June 30, 1922.]

Now comes the defendants in error in the above-entitled cause and represent to this Honorable Court that they intend to file a petition in the Supreme Court of the United States for a writ of certiorari.

Wherefore they move that the issue of the mandate in the above-entitled cause be stayed pending the determination by said Supreme Court of their petition for a writ of certiorari, or until the further order of this court. By their Attorneys, Dunbar & Rackemann.

Dated June 30, 1922.

On the same day, to wit, on the thirtieth day of June, A. D. 1922, the following Order of Court was entered:—

ORDER OF COURT.

June 30, 1922.

Upon motion of defendants in error, setting forth that they propose to file a petition in the Supreme Court of the United States for a writ of certiorari, It is ordered that the mandate in this case be, and the same hereby is, stayed until further order of this court, upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court. Arthur I. Charron, Clerk.

CLERK'S CERTIFICATE.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 62, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including July 7, 1922, in the cause in said court numbered and entitled,

63 No. 1553.

JOHN F. MALLEY, Formerly Collector of Internal Revenue, Defendant, Plaintiff in Error,

v.

ALVAH CROCKER et al., Trustees, Plaintiffs, Defendants in Error.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit of Appeals for the First Circuit, at Boston, in said First Circuit, this seventh day of July, A. D. 1922. [United States Circuit Court of Appeals, First Circuit.] Arthur I. Charron, Clerk.

64 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which John F. Malley, Formerly Collector of Internal Revenue, is plaintiff in error, and Alvah Crocker et al., Trustees, are defendants in error, No. 1553, October Term, 1921, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the

65 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

66 [Endorsed:] File No. 29,137. Supreme Court of the United States, No. 587. October Term, 1922. Alvah Crocker et al., Trustees, vs. John F. Malley, Collector. Writ of Certiorari.

67 **RETURN ON WRIT OF CERTIORARI.**

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued that the certified copy of the record heretofore filed in the Supreme Court of the United States shall constitute the return to the writ of certiorari issued therein.

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court, at Boston, in said First Circuit, this eleventh day of December, A. D. 1922. [Seal of United States Circuit Court of Appeals, First Circuit.] Arthur I. Charron, Clerk.

68 United States Circuit Court of Appeals, for the First Circuit.

No. 1553.

JOHN F. MALLEY, Collector, Plaintiff in Error,
v.
ALVAH CROCKER et al., Trustees, Defendants in Error.

STIPULATION.

[Filed December 11, 1922.]

In the above entitled case, it is hereby stipulated that the certified transcript of record on file in the office of the Clerk of the Supreme Court of the United States, in the matter of Alvah Crocker et al., Trustees, Petitioners, vs. JohnF. Malley, Collector, Respondent, and there numbered No. 587 of the October Term, 1922, upon the docket of said Court, may be taken as a return by this court to the Writ of Certiorari issued by the Supreme Court of the United States in said case. Felix Rackemann, Harrison M. Davis, Attorneys for Alvah Crocker et al., Trustees, Defendants in Error. James M. Beck, Attorney for John F. Malley, Collector, Plaintiff in Error.

A true copy: Attest: [Seal of United States Circuit Court of Appeals, First Circuit.] Arthur I. Charron, Clerk.

69 [Endorsed:] File No. 29137. Supreme Court U. S. October Term, 1922. Term No. 587. Alvah Crocker et al., Trustees, Petitioners, vs. John F. Malley, Collector etc. Writ of Certiorari and Return. Filed Dec. 13, 1922.